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No. 1140

In the Supreme Court of the United States

OCTOBER TERM, 1969

KING RADIO CORPORATION, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement:	
A. The Board's findings of fact	2
B. The Board and court decisions	7
Argument	8
Conclusion	11

CITATIONS

Cases:	
May Department Stores Co. v. *National Labor Relations Board*, 326 U.S. 376	9
National Labor Relations Board v. *Bradley Washfountain Co.*, 192 F. 2d 144	10
National Labor Relations Board v. *Crompton Highland Mills, Inc.*, 337 U.S. 217	9
National Labor Relations Board v. *Insurance Agent's International Union*, 361 U.S. 477	9
National Labor Relations Board. v. *Katz*, 369 U.S. 736	9
National Labor Relations Board v. *Landis Tool Co.*, 193 F. 2d 279	10
National Labor Relations Board v. *United Nuclear Corp.*, 381 F. 2d 972	9
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	9
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), Sec. 8(a)	2, 7, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A–7A) is reported at 416 F. 2d 569. The Board's decision and order (A. 1067–1084)[1] are reported at 172 NLRB No. 109.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1969 (Pet. App. A8, A14), and a petition for rehearing was denied on November 17, 1969. The petition for a writ of certiorari was filed on February 2,

[1] "A." refers to the joint appendix to the parties' briefs in the court below.

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the company violated Section 8(a)(5) and (1) of the National Labor Relations Act by granting a general wage increase and making other changes in its wage system without first bargaining in good faith to an impasse with the employees' union representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. A18–A21 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Company manufactures aircraft radios in its "Silver Crown" and "Gold Crown" plants in Olathe, Kansas. After a Board-conducted election held in June 1966, the Communications Workers of America, AFL–CIO ("the Union") was certified as the representative of the production and maintenance employees at these plants. In prior proceedings (166 NLRB No. 70 and 166 NLRB No. 10), the Board found that the Company, both before and after the election, engaged in a variety of unfair labor practices, in violation of Section 8(a)(1), (3), and (5) of the Act. These included the unilateral promulgation and enforcement of a "no-talking" rule,

the unilateral termination of payroll deductions, the unilateral establishment of a new retirement policy, and the discharge of individuals because of union activity and for testifying in a Board proceeding. The court of appeals sustained the Board's unfair labor practice findings and enforced its order, 398 F. 2d 14. Meanwhile, negotiations between the Company and the Union commenced in October 1966, and the present case involves the propriety of the Board's finding that the Company further violated the Act by making wage changes during those negotiations without first bargaining about them with the Union. The facts with regard to the wage changes are as follows:

The bargaining unit consisted of about 350 employees, most of whom were women assigned to various job classifications (A. 869–879). Under the Company's practice during the period in question, employees without experience were hired as "Trainees" at $1.25 an hour; experienced employees were hired at from $1.40 to $1.50 an hour, depending on the classification. Whether hired as "Trainees" or at a higher rate, new employees received 5¢ an hour raises each month for the first four months. Wage progression was automatic to the top rates, which ranged from $1.60 to $1.90. (A. 1094, 1097, 1109, 1112; 253, 254.)

The Union's initial wage proposal, which it submitted on October 25, suggested a hiring base rate of $1.60 an hour for all classifications, and top rates ranging from $2.15 to $2.60. Employees would start at the base rate and receive 10¢ increases every three

months until they reached the top of their classification. (A. 1347–1359.)

On December 1, the Company made this counterproposal: (1) employees hired as "trainees" would receive $1.40 an hour (instead of $1.25), and would advance to the "starting rate" of $1.50 after 90 days; (2) employees hired at the "starting rate" of $1.50 an hour would receive 5¢ an hour increments each 90 days until they reached their "base rate," ranging from $1.65 to $1.85; (3) after attaining the "base rate," employees would receive—at the Company's sole discretion—merit increases of 5¢ an hour each six months until they reached their "top rate," ranging from $1.75 to $2.20; (4) the Company could, in its sole discretion, designate employees as "lead men" and award them premium pay; and (5) the Company would be free to pay more than the specified rates to any employee who, in its opinion, had demonstrated "outstanding performance or ability" (A. 111, 112). The Union objected to this proposal as inadequate, unreasonable and, because of its merit features, conducive to favoritism (A. 112; 254, 270).

At the December 9 bargaining session, the Union reduced its wage demand. It proposed that employees currently at the top rate should receive immediately half the difference between that rate and the rate the Union had originally proposed; thereafter they would progress to the new top rate by raises of 10¢ every 90 days. Employees below the top rates would receive one-half the difference between their current rate and what they would be making under the Union's pro-

posal, taking into account their length of service. The Company did not agree to this proposal. (A. 962–963.)

At the bargaining session on January 9, 1967, Company representatives stated that "they had offered all they intended to in the area of wages" and "did not intend to spend more money than they had already proposed" (A. 114; 261, 1805; 365). Company Attorney Haynes added that the Union "had made wild promises to the employees during the organizing campaign and [the Company] intended to see that the Union did not pay off on these promises" (A. 1115; 276). Three days later, the Company wrote the Union, proposing an immediate 10¢ across-the-board increase if the Union would accept the Company's entire wage package and regard the raise as a substitute for two periods of review except as to employees receiving less than the "starting rates" (A. 1115).

On Saturday, January 28, the Company wrote the Union of its intention to give "wage increases to all bargaining unit employees not to exceed those offered but rejected by the Union" (A. 1116). According to the Company, the action was "a result of the Fair Labor Standards Act minimum wage requirements" scheduled to take effect on February 1 (A. 1117).[2] There had been no previous reference at the bargaining table to the February 1 change in the minimum wage law, nor had the Company at any time indicated that it contemplated putting its 10¢ wage offer into effect with or without the Union's consent (A. 1096–1098, 1116). The Union received the letter on Janu-

[2] The amendment raised the minimum wage to $1.40 an hour.

ary 30, and arranged to meet with the Company the following day (A. 1116; 281).

At the meeting, the Union consented to the raises required by law—which involved only about 30 of the 350 employees in the unit—but objected to the rest (A. 1096; 281–283). Attorney Haynes conceded that only a few raises were mandatory, but stated that, whether or not the Union agreed to the Company's proposal, it would be put into effect on the following day (A. 1118; 729, 735).[3] Haynes added that all the discretionary features of the Company's earlier wage proposals would also go into effect (A. 1096). The following day, the Company posted a notice that "the Company is making the following changes in its classifications and minimum rates of pay for employees included in the bargaining unit." In addition to a 10¢ raise for "all employees not affected by the wage and hour increases," the notice set forth the four-part (*i.e.*, "Training," "Starting," "Base," and "Top") wage rate system previously proposed; instituted 90-day and 6-month review periods; and eliminated review of employees above the "starting" rate for "two consecutive normal review periods" (A. 1096–1097, 1116–1118).

The parties met again on March 24, and the Union submitted a lower pay proposal for the first year of the contract (A. 1123; 888). Attorney Haynes rejected it, stating that he would negotiate on wages for the second and third years of the contract but was "not

[3] Asked if his intention was "to establish wages now for this year," Haynes replied, "that [is] right" (A. 734–735).

willing to negotiate on wages for this year" (A. 1123; 306).[4] On March 27, the employees went on strike. During the strike, the parties bargained on three occasions, but, when the wage issue arose, Attorney Haynes reasserted that the Company had no more to give during 1967 (A. 1127; 772–773).

B. THE BOARD AND COURT DECISIONS

Adopting the Trial Examiner's decision, the Board found that the Company's unilateral wage and wage system changes violated Section 8(a)(5) and (1) of the Act. Rejecting the Company's contention that it had bargained in good faith to impasse about its wage proposal before puttting it into effect, the Board noted that the parties' negotiations "were then * * * in mid-stream and no impasse had been reached, as to wages or otherwise"; that the Company's conduct at the bargaining session of January 31 "evidences no real disposition on [the Company's] part to bargain" about the changes; that the Company failed to justify the need to institute immediately wage increases not required by law as well as the "far reaching wage structure changes"; and that the foregoing conduct took place amidst a "stream of unfair labor practices perpetrated contemporaneously, as well as previously and subsequently" (A. 1097–1099). The Board concluded that the Company had "seized upon the minimum-wage law amendment to introduce substantial changes in its wage structure unilaterally and to use

[4] Haynes said again that he "knew that the Union had made a lot of wild promises to the employees * * * and they weren't going to wind up with a wage increase this year" (A. 1123).

the statutory amendment as an excuse for continuing not to bargain in good faith * * *'" (A. 1100). The Board ordered the Company, *inter alia,* to restore its former wage system,[5] and to refrain from making future changes in it without first bargaining in good faith with the Union (A. 1173, 1175).

The court of appeals found that there was no substance to the Company's contention that the minimum wage law amendment had "prompted a good faith increase for all bargaining unit employees," for the increases "were unequally distributed among the employees in the bargaining unit without regard to merit" (Pet. App. A2–A3). The court also found that the Company had failed to sustain its contention that "the unilateral wage changes were instituted after the point of impasse had been reached," observing that "[t]he wage changes were instituted during purported negotiations concerning that very subject" (Pet. App. A3). Accordingly, the court sustained the Board's finding that the Company's unilateral wage changes violated Section 8(a)(5) and (1) of the Act, and enforced the Board's order in that regard (Pet. App. A3, A6–A7).

ARGUMENT

The question which the petition seeks to raise (Pet. 2, 9–10)—whether an employer during contract negotiations may lawfully give a raise over the bargaining agent's objection after the employer has

[5] The Board provided, however, that "All increased minimum wage rates, whether statutory or otherwise, for all job classifications * * * shall not be abrogated or reduced or otherwise changed without bargaining with the Union thereon" (A. 1174).

bargained about the matter in good faith—is not presented here. The Board found that the Company "did [not] in fact bargain in good faith with the Union concerning these changes," and that the parties had not bargained to impasse before the employer's unilateral action (A. 1096, 1097). The court of appeals sustained both findings, holding that the raise was "not a good faith increase" and that the wage system changes were made, not after impasse, but rather "during purported negotiations concerning that very subject" (Pet. App. A3). Given these findings, the decision below is in accord with settled authority. *E.g., National Labor Relations Board* v. *Katz,* 369 U.S. 736; *National Labor Relations Board* v. *Crompton Highland Mills, Inc.,* 337 U.S. 217, 221–225; *National Labor Relations Board* v. *Insurance Agent's International Union,* 361 U.S. 477, 485; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U.S. 376, 383–385; *National Labor Relations Board* v. *United Nuclear Corp.,* 381 F. 2d 972, 977–978 (C.A. 10). Petitioner's contention that it negotiated in good faith to the point of impasse thus raises only an evidentiary issue which is not appropriate for further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

In any event, the record amply supports the Board's finding that the Company's actions were not taken in good faith. Thus, while the Company's January 12 letter offer of a 10¢ raise introduced an important new element into wage bargaining, the parties had no opportunity to discuss the matter until the emergency meeting of January 31. At that meeting, meaningful negotiations

were precluded by the Company's adamant position that its whole wage package had to go into immediate effect. (*Supra*, p. 6.) Moreover, the Company was required by law to raise the wages only of some 30 of the 350 employees in the unit and its excuse that the other raises were necessary to preserve wage comparability was belied by the fact that those raises exceeded the amount of the minimum wage increase and were distributed unequally among the remaining employees (A. 1095; Pet. App. A2–A3). Finally, the Board was entitled to consider the fact that the unilateral actions were set in a "stream of unfair labor practices perpetrated contemporaneously as well as previously and subsequently" (A. 1099).

The cases cited by petitioner as in conflict with the decision below are factually distinguishable. In *National Labor Relations Board* v. *Landis Tool Co.*, 193 F. 2d 279 (C.A. 3), the alleged violation involved an increase of 7 cents given to 15 pattern makers at the same time that 900 other plant employees received the same increase; the union did not object until 4 months later, and the court found that the pattern makers' raise was in fact pursuant to an understanding reached earlier by the parties. In *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 150–152 (C.A. 7), the union proposed a 16-cent raise and other economic improvements; the employer, after full consultation with the union, then put a 15-cent raise into effect and advised that it was willing to continue bargaining about the balance of the union's demands. In addition, as the court noted, the parties had a long history of friendly relations. Here, in contrast, there was

little or no consultation with the Union prior to the Company's unilateral action; the changes went far beyond a raise in wage rates; the Company immediately withdrew from further wage bargaining for the rest of the year; and the conduct took place against a background of virulent opposition to the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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